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RAILROAD FIRES—EVIDENCE OF NEGLIGENCE.

Destructive conflagrations arising from the escape of sparks from locomotives are not unfrequent, and provide a fruitful source of litigation. It being conclusively settled that a railroad company is not liable for an accidental loss of this character, but that in order to obtain redress for his injuries the sufferer must establish negligence on the part of the defendant, what shall be deemed sufficient evidence of negligence becomes generally the first question which presents itself in actions for damages caused by fire. Two very recent Pennsylvania cases suggest a review of the decisions on this point.

In *Jennings v. Pennsylvania Railroad Company*,[1] the action was for loss by fire, occuring through the alleged negligence of the defendant, of a certain quantity of hay in plaintiff's meadow adjacent to the railroad, by sparks thrown from the defendant's engine. The plaintiff's evidence was to the effect that on account of the steep grade at this point the engines were often overworked and overloaded, causing larger sparks than usual to fly from the smoke-stacks, and that the plaintiff's meadow was burned by the sparks. There was no evidence that the particular locomotive in question was improperly constructed. The defendant's evidence was to the effect that their engines were provided with the best approved spark-catchers, the most perfect in the service, and the best that were known or heard of at the time used. The court held that there was no evidence of negligence to go to the jury and directed a verdict for the defendant. On appeal this ruling was affirmed, the Supreme Court saying: "To hold that the fact of the fire having taken place, was *prima facie* evidence that the spark-arrester was defective, and therefore, that the case ought to have been submitted to the jury, would be practically to hold railroad companies liable for all fires; for it is notorious that no spark-ar rester has yet been invented to prevent all sparks, and a little spark may kindle as large a conflagration as a larger one, it depending very much on the dryness or humidity of the atmostphere, whether a spark will go out before reaching the ground, and whether what it reaches is in a condition to be easily ignited." In *Reading & Columbus Railroad Company v. Latshaw*[2] decided by the same court, March 15th, 1880, the claim was similar to that in the former case. The defendant's counsel requested the court to charge the jury that as the only evidence offered by the plaintiff was that shortly after the train passed the grass was seen to be on fire, there was no evidence of negligence and therefore the verdict must be for the defendant, and that as it was shown that the spark-arrester on the locomotive was of the most efficient kind and in good condition and properly managed, they were not guilty of negligence and the verdict should go for them. The court refused to so instruct, but left it to the jury to say on the whole case whether there had been any negligence. The jury found for the plaintiff. On appeal to the Supreme Court, the judgment was reversed for the reasons given in the previous case.

Such a doctrine, viz.: that proof of the escape of fire from a locomotive without more does not establish a *prima facie* case of negligence on the part of the company, though supported by previous decisions in Pennsylvania[3] and some other States,[4] does not commend itself as reasonable or just. The cases in which the contrary doctrine has been adopted are numerous and authoritative, and include all the English adjudications from the earliest down to the present time. In Aldridge v. Great Western R. Co.,[5] decided in 1841, the first action against a railroad for causing fires, the case stated for the opinion of the court, simply showed that the engine of the defendant was of the kind used

[1] 37 Leg. Int. 157.

[2] 37 Leg. Int. 157.

[3] Railroad Co. v. Yeiser, 8 Pa. St. 366.

[4] Sheldon v. Hudson River R. Co., 14 N. Y. 218; Kansas Pacific R. Co. v. Butts, 7 Kas. 308; Hull v. Sacramento R. Co., 14 Cal. 387; Burroughs v. Housatonic R. Co., 15 Conn. 124; Indiana Cent. R. Co. v. Paramore, 31 Ind. 143; Ellis v. R. Co., 2 Ired. 138; Jefferis v. R. Co., 3 Houst. 447; Ruffner v. Chicago &c. R. Co., 7 Cent. L. J. 316; Thomp. on Neg. Cap. II.

[5] 3 M. & G. 515.

on railroads generally, and at the time of the damage was being used in the ordinary manner. The Court of Common Pleas refused to decide the question as on a "case stated," but ordered it to be submitted to a jury. "I am not prepared to say," said Tindal, C. J., "that the fact of the engine emitting sparks may not amount to negligence." In Piggott v. Eastern Counties R. Co.[6] the principal question was as to the evidence of negligence, Coltman, J., said: "The fact of the building being fired by sparks emitted from the defendant's engine established a *prima facie* case of negligence which called upon them to show that they had adopted some precautions to guard against such accidents." MAULE, J., added: "It appears that the plaintiff was possessed of certain farm buildings adjoining the railway, and that in consequence of the sort of management adopted by the company fire was thrown from a passing engine upon these buildings and destroyed them. I am far from saying that it is impossible that this could have occurred without negligence on the part of the company. But it at least affords a strong presumption of negligence."

In Bass v. Chicago &c. R. Co.,[7] decided by the Supreme Court of Illinois in 1862, Breese, J., who delivered the opinion of the court, said: "The first question that arises is, does the mere fact of fire escaping from a locomotive, by which property is destroyed, imply negligence? At an early period in the history of railroads, it was settled by the courts of Great Britain, upon great consideration, that the fact of premises being fired by sparks emitted from a passing engine was *prima facie* evidence of negligence on the part of the company, making it incumbent on them to show that proper precautions had been adopted by them reasonably calculated to prevent such accidents. * * * * We think that there is great justice in the English rule, and are inclined to adopt it as most conducive to the safety of property on our lines of railroad, extending as they do through vast prairies filled at certain seasons of the year with dry grass of a highly inflammable nature." In the next case in this State where the same question arose, Walker, C. J., added other reasons in support of the rule adopted by the court in 1862: "Observance and experience," he said, "teach that engines unprovided with such appliances [*i. e.*, to prevent the escape of fire] are liable in a high degree to communicate fire to adjoining property. And experience proves that by the use of modern inventions for the purpose, the escape of fire may ordinarily be prevented. And when it does escape we may safely infer that such machinery has been omitted, and require the company to show that it was employed and in proper condition. In this there is no hardship, as the engine is under the control of the employees of the road, and they know, or at least are bound to know, that the engine is properly equipped to prevent fire from escaping. They know whether any mechanical contrivances were employed and, if so, their character. Trains passing at a high rate of speed are not accessible to examination by persons not connected with the train, and who are thereby denied all means of ascertaining whether the necessary equipments are employed by the company. Hence the necessity of requiring the company to show their use at the time, to rebut the presumption of negligence." In Burke v. Louisville &c. R. Co.,[8] an action for destroying plaintiff's house by sparks from defendant's engine, the defendant requested the court to charge that if the plaintiff sought to recover on the ground of negligence, the burden of proof of negligence was upon him, which request the court refused. This ruling was affirmed by the Supreme Court of Tennessee, such "not being the law as applicable to this kind of case." "The reasons given for requiring the companies to show that this duty has been performed on their part," say the Supreme Court of Wisconsin, "are that the agents and employees of the road know, or at least are bound to know, that the engine is properly equipped to prevent fire from escaping, and that they know whether any mechanical contrivances were employed for that purpose, and if so what was their character; whilst, on the other hand, persons not connected with the road, and who only see trains passing at a high rate of speed, have no such means of information, and the same is inaccessible to and can not be obtained by them without great trouble and expense, and then often only as a

[6] 3 C. B. 228.
[7] 28 Ill. 9.
[8] 7 Heisk. 451.

favor from the company which, under the circumstances, the company would be very likely to withhold. These considerations seem to this court to afford very clear and satisfactory grounds in support of the rule." The same doctrine, for the same reason, is held in Nevada [9] and Nebraska.[10]

In Missouri this point was for some time unsettled. In 1866 it was ruled by the Supreme Court that in cases of this character evidence of negligence must be produced by the plaintiff in addition to proof of the simple fact of the escape of fire or he could not recover.[11] This conclusion was reached by Holmes, J., after a technical discussion which wholly ignored the question of public convenience and policy. It was not long, however, before this doctrine was overruled, and the law as to the evidence of negligence in actions against railroads for causing fires set at rest.[12] "We may safely presume," said Vories, J., in delivering the opinion of the court in the case of Clemens v. Hannibal etc. R. Co.,[13] "that railway companies are not running locomotives on their roads the natural or probable effect of which would be to set fire to the farms of those who resided along the road if they were carefully managed, from which the natural presumption would be that when fire escaped and burned up the farms along the road it proceeded from negligence. If it should be held otherwise it would amount to a denial of justice to those who were injured by such fires. It would be in most cases wholly impossible for the farmer who was injured to be able to tell how the servants of the company were conducting the business, and they would be in most cases wholly ignorant by what witnesses the fact of negligence could be proved. These are facts that would be peculiarly within the knowledge of the defendant and its servants. In such cases the *onus* should devolve on the defendant to prove how it and its servants were conducting its business at the time the fire escaped. The question is now I consider well settled in this State."

These reasons seem conclusive. That independent of contract no presumption of negligence can ordinarily arise from the mere happening of an accident may be admitted, but to this rule there can in hardly any case be any objection. Others besides railroads are liable to actions for negligently setting out fires—a man, for example, clearing his land in this manner or running his mill by this agency, is answerable under some circumstance—and there is no dissent from the rule that in such cases the fact of fire does not raise a presumption of negligence. Here it is generally easy for the person injured to show some facts from which an inference of negligence may properly arise. But a farmer whose property has been destroyed by a spark from a locomotive, what does he know or what can he prove except that his house or crops have been destroyed, and that the defendant furnished the means? He must suffer his injury without redress if the company have used engines adapted to the purpose and without defect; is it too much then to demand of them that they shall prove this and not he?

But if the courts will take notice of the progress which is being made in mechanical invention they can easily find another ground on which to base the rule for which we contend. We have read so frequently in journals devoted to the railroad interests, of contrivances which are in use on some roads, and which it is said absolutely prevent the escape of sparks of sufficient size to cause damage, that we are satisfied that such safeguards are to be had. If so, it is the duty of the railroads to use them; if, on account of either expense or inconvenience, they are not adopted by a particular road the responsibility is theirs. Whenever the courts are able to find as a matter of common observation that the sparks from locomotives can be restrained if the proper means are used, then, without being obliged to call either public policy or precedent to their support, they can decide that the escape of fire is negligence. Judicial support for this finding is even now not wanting, for more than one judge has already expressed the opinion that it is perfectly practicable to adopt precautions that will render such accidents impossible.[14]

[9] Lonabaugh v. R. Co., 9 Nev. 271.

[10] Burlington &c. R. Co. v. Westover, 4 Neb. 268.

[11] Smith v. Hannibal etc. R. Co., 37 Mo. 287.

[12] Bedford v. Hannibal etc. R. Co., 46 Mo. 456; Fitch v. Pacific R. Co., 45 Mo. 322.

[13] 53 Mo. 366.

[14] See the remarks of Maule, J., in Piggott v. Eastern Counties R. Co.; of the Supreme Court of Illinois

The vice of the rule laid down in the two Pennsylvania cases is that a party who has suffered an injury is denied redress for the reason that he is not prepared with evidence which it is impossible for him to obtain, but which the party by whom the injury was done has in his possession and can easily produce. The importance of the question lies in the fact that without such a presumption the plaintiff can not get the opinion of the jury on the question of the conduct of the defendant. On the other hand with such a presumption to start with he can have his case decided by the jury, for the question of the sufficiency of the locomotive and of its management is one of fact and not of law.[15]

APPELLATE COURTS AND SOME NEEDED REFORMS.—II.

The record being thus prepared the counsel for the respective parties should, under the ordinary rules governing such cases, be required to file, not elaborate written or printed arguments, but "briefs" of points and authorities. These are briefs in their more ancient and appropriate acceptation, before lawyers adopted the practice of printing books for appellate courts.

Among a large class of lawyers this definition of "briefs" is well understood. But in those States where oral arguments are ignored, many have but an imperfect idea of any thing in the form of a brief which does not contain an elaborate argument. For the benefit of such, we insert a specimens taken from a report in a court where this class of briefs prevails. The case was assumpsit, with a plea of usury, with a question as to the right to compel the plaintiff to testify, the objection being that he would criminate himself, usury being criminal. The brief runs thus:

"M. T. W. for the defendant, moved for a new trial on a bill of exceptions. 1. Where there is only an usurious agreement, but no usurious premium paid, there is no criminal offense committed. Stat of 1837, p. 487, § 6; Clark v. Badgley, 3 Halst. 233; Henry v. Bank of Salina, 5 Hill, 523, per Walworth, C. Id. 537, note *a*. 2. Where the offense is barred by the statute of limitations the witness is bound to testify respecting it. People v. Mather, 4 Wend. 229; 1 Phil. Ev. 233, note *a*; United States v. Smith, 4 Day, 123; Cowen & Hills notes to Phil. Ev. 739, note 516; Roberts v. Allatt, 1 Moo. & Mal. 193."

"W. H. for the plaintiff. Conceding that the criminal offense consists in the illegal agreement and the actual receipt of an usurious premium, proof of the agreement is an important step towards making out the offense; and if the witness knows that the case is such that he can be proved guilty of the offense, that fact being established, he can not safely answer, and is privileged from testifying. He is to judge whether his testimony will implicate him or not. People v. Mather, 4 Wend. 236."

This is given as a model of a case presenting two points on the one side and one on the other. Where cases present a variety of questions the brief of counsel conforms to the state of the case and is extended accordingly.

The briefs being prepared and filed and the cases ready for submission, the dockets should be regularly called for oral argument. In those States where oral arguments have not usually prevailed there seems to be a prejudice against them, based upon the proposition that they are too frequently ill-prepared, discursive and time-wasting. Under proper regulations and restraints these faults may be obviated. To lawyers accustomed to oral arguments as they prevail in many of the State appellate courts and the Federal Supreme Court, nothing need be said in vindication of their superiority. Bnt as in many of the States oral arguments in the appellate courts are exceptional and regarded with disfavor, a few of their advantages may be mentioned:

First. Speaking figuratively, human thought like mechanical power is more or less forcible and efficient in proportion to the amount of friction it encounters in its communication, and the amount of friction is much determined by the *media* of communication. However forcible the argument may be, if written in an illegible hand much of its force is lost by the medium of communication. Again, however much the force of the same argument may be increased by good chirography, it is still better when printed. But the most easy and forcible means of communication is the human voice added to the magnetism of personal presence. And the more clear, forcible and impressive the arguments where both sides meet, the more readily is the court led to right conclusions. *Second.* Where the counsel who try a case at *nisi prius* following it at every step from the filing of the first paper to the final judgment, and then preparing it for the appellate court, meet in argument, their familiarity with the record will enable them to communicate to the court in two or three hours orally a better knowledge of the case than can be done by a written or printed brief of any length and elaboration. Besides the superiority of the method, a single suggestion or inquiry from the bench will bring out points which cost the court much time and trouble to settle by mere examination of the record. *Third.* Where the cases are orally argued all the judges hear the argument, which is a thing almost impracticable where the case is submitted wholly on written or printed arguments. Indeed, so impracticable is the attempt to have all the judges read or hear read the written or printed argument when the case is submitted upon it, that it is not generally attempted. Upon an oral argument

in Chicago etc. R. Co. v. Quaintance, 58 Ill. 389, and of the Supreme Court of Iowa in Small v. Chicago etc. R. Co. 6 Cent. L. J. 310.

[15] Burlington etc. R. Co. v. Westover, 4 Neb. 268.

each judge having a printed case and a printed brief of points and authorities, however commonplace such an argument may be, the judges are better prepared upon consultation to arrive at right conclusions than they possibly can become by any other method. The proof of the superiority of this method is found in the superiority of the reports of the courts which have oral arguments. The mode pointed out here is substantially that of the Supreme Court of the United States. And whatever criticism may be made upon the court or its judges at any period of its history, it can be safely said that no court in any country shows in its reports greater uniformity of decision upon all the leading heads of the law; nor are its opinions inferior to those of any other court in the thoroughness and breadth of research of which they give evidence, or in any other of the attributes which manifest careful and patient research, careful examination and thorough sifting of every question involved in the cases. The frequency of the dissents and the character of the dissenting opinions are a tribute to the thoroughness and perfection of their methods, as well as the ability and independence of the judges. And so far from being ground of criticism they are rather ground for the highest compliment. The same argument might be farther strengthened, by reference to the State courts where oral arguments prevail, but allusions to particular State courts might be regarded as invidious.

3. The mode of considering and determining cases involves the examination of questions which should be modestly approached by any one wholly without experience. Being in that condition, we only propose to note a few things pertaining to the subject, the result of observation and information obtained from those who have had experience. The mode of examining cases upon a record and argument depends so much upon the conditions under which it is done, that little can be said of a general nature, which will not be affected by exceptions growing out of these conditions, so as to prevent its being of any great value. But we will proceed by considering the most favorable conditions for the work of an appellate court. Take a cause presented upon a printed case, printed brief, and after oral argument; there is no possible difficulty, nor is there any difference of opinion as to the mode of consultation. There is nothing to be done but to take up the points presented upon the printed brief and oral argument, *seriatim*, and consider them by the whole court, pass upon them, note the result and assign the case to a judge to write an opinion, which, when written, is again read in presence of all the judges, passed upon, assented to, criticised and concurred in or dissented from, as the case may be.

It is because the work of the judges is rendered more easy and accurate, under the system of printing and oral argument, that we urge it with so much earnestness. But many courts have to grapple with ponderous written records, with imperfect and badly written briefs, without any oral arguments. In these courts two methods prevail. One is to have the chief justice distribute the records, and let each judge take his records in their order, examine the written or printed arguments on the respective sides, examine the authorities, and write his opinions. And at stated periods in consultation these opinions are submitted to the whole court for consideration and approval, or dissent. The other method is to have the records distributed as in the first mode, but have the judge make only such an examination of the case as to become familiar with the points, then, in consultation, let the points be taken up in their order, the arguments read in presence of the whole court, the authorities sifted, and such an examination made as to have the concurrent opinion of all the judges upon all the points, or a decided dissent where any do not concur. Then the case goes back to the judge to whom it was assigned, or is assigned to another, to have an opinion written in accordance with the decision of the several points noted in the progress of the consultation. By the first method the decision is in legal contemplation, and generally in fact, the decision of the whole court—but only upon the examination and due consideration and investigation of one judge. For the others do not read the arguments, do not examine the records, do not examine the authorities, and can not in general possess such familiarity with the learning involved, or with the points presented, as to give the report of cases thus considered the weight they should possess, where they constitute the law of the land. True, the examination and consultation upon a case even under this method carefully done, will generally produce right results. But it only requires an innocent mistake of one judge, in many cases, to mislead the whole bench. This is shown by the frequent granting of rehearings, and the great conflict in the rulings upon the same point, in opinions which are written by the different judges even within very short periods. Such things can not occur where all the judges participate in the examination and discussion of all the points, arguments, and authorities; but must and will frequently occur where they do not. The latter method is preferable, because it prevents the evil pointed out in reference to the former. Indeed it is the best method that can be adopted without oral argument, for while it is tedious, the greater certainty and accuracy atone for the want of speed. The former method can only be tolerated as a measure of necessity. The writer heard one of the ablest ex-supreme judges in the West state in a bar meeting, that a judge who gets wrong in a case under the system of judges writing their opinions before consultation, and can not carry his associates with him into concurrence in his wrong opinion, is unfit for his position. This may be regarded as strong langauge, but such methods are very imperfect, as all experience proves.

But the urgent necessity of the present time is more judicial force in the appellate courts, with adequate pay, a better preparation of the cases for hearing, and full oral arguments. These being provided, the proper method of consultation

will necessarily follow. So that, after all, bad methods of hearing and determination usually follow imperfect preparation and presentation.

CONSTITUTIONAL LAW — FOURTEENTH AMENDMENT—DUE PROCESS OF LAW.

BOWMAN v. LEWIS.

Supreme Court of the United States, October Term, 1879.

1. The equality clause in the first section of the Fourteenth Amendment viz., that which prohibits any State from denying to any person the equal protection of the laws, contemplates the protection of persons, and classes of persons, against unjust discriminations by a State; it has no reference to territorial or municipal arrangements made for different portions of a State.

2. It was not intended to prevent a State from arranging and parceling out the jurisdiction of its several courts as it sees fit, either as to territorial limits, subject-matter, or amount, or the finality of their several judgments or decrees.

3. Each State has full power to make political subdivisions of its territory for municipal purposes, and to regulate their local government, including the constitution of courts, and the extent of their jurisdiction.

4. A State may, if it pleases, establish one system of law in one portion of its territory, and another system in another, provided always that it does not encroach upon the proper jurisdiction of the United States, and does not abridge the privileges and immunities of citizens of the United States, nor deprive any person of his rights without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws in the same district.

5. By the Constitution and laws of Missouri a court called the St. Louis Court of Appeals has exclusive jurisdiction in certain cases of all appeals from the circuit courts in St. Louis and some adjoining counties; the Supreme Court has jurisdiction of appeals in like cases from the circuit courts of the remaining counties of the State: *Held*, that this adjustment of appellate jurisdiction is not forbidden by anything contained in the Fourteenth Amendment.

In error to the Supreme Court of the State of Missouri.

Mr. Justice BRADLEY delivered the opinion of the court:

This is a writ of error to the Supreme Court of Missouri, brought by Frank J. Bowman, the plaintiff in error, to reverse a judgment of that court refusing to issue a *mandamus* to the St. Louis Court of Appeals, consisting of the three judges named as defendants in error. The object of the *mandamus* applied for by Bowman was to compel the St. Louis Court of Appeals to grant his appli for an appeal from a judgment of said court to the said Supreme Court of Missouri, which application had been refused. The judgment which he complained of was an affirmance of a judgment previously given by the circuit court of the city of St. Louis removing him from practice at the bar.

By the Constitution and laws of Missouri an appeal lies to the Supreme Court of that State from any final judgment or decree of any circuit court except those in the counties of St. Charles, Lincoln. Warren and St. Louis, and the city of St. Louis; for which counties and city the Constitution of 1875 establishes a separate court of appeal called the St. Louis Court of Appeals, and gives to said court exclusive jurisdiction of all appeals from, and writs of error to, the circuit courts of those counties and of said city; and from this court (the St. Louis Court of Appeals) an appeal lies to the Supreme Court only in cases where the amount in dispute, exclusive of costs, exceeds the sum of $2,500, and in cases involving the construction of the Constitution of the United States or of Missouri, and in some other cases of special character which are enumerated. No appeal is given to the Supreme Court in a case like the present arising in the counties referred to, or in the city of St. Louis; but a similar case arising in the circuit courts of any other county would be appealable directly to the Supreme Court.

The plaintiff in error contends that this feature of the judicial system of Missouri is in conflict with the Fourteenth Amendment of the Constitution of the United States, because it denies to suitors in the courts of St. Louis and the counties named the equal protection of the laws, in that it denies to them the right of appeal to the Supreme Court of Missouri in cases where it gives that right to suitors in the courts of the other counties of the State.

If this position is correct, the Fourteenth Amendment has a much more far-reaching effect than has been supposed. It would render invalid all limitations of jurisdiction based on the amount or character of the demand. A party having a claim for only five dollars could with equal propriety complain that he is deprived of a right enjoyed by other citizens, because he can not prosecute it in the Superior Courts; and another might equally complain in that he can not bring a suit for real estate in a justice's court where the expense is small and the proceedings are expeditious. There is no difference in principle between such discriminations as these in the jurisdictions of courts and that which the plaintiff in error complains of in the present case.

If, however, we take into view the general objects and purposes of the Fourteenth Amendment we shall find no reasonable ground for giving it any such application. These are to extend United States citizenship to all natives and naturalized persons, and to prohibit the States from abridging their privileges or immunities, and from depriving any person of life, liberty or property without due process of law, and from denying to any person within their jurisdiction the equal protection of the laws. It contemplates persons and classes of persons. It has not respect to local and municipal regulations that do not injuriously affect or discriminate between persons or classes of persons within the places or municipalities for which such regulations are made. The amendment could never have been intended to prevent a State from arranging and parceling out the jurisdiction of its several courts at its discretion. No such restriction as this could have been in view, or could have been included, in the prohibition that "no State

shall deny to any person within its jurisdiction the equal protection of the laws." It is the right of every State to establish such courts as it sees fit, and to prescribe their several jurisdictions as to territorial extent, subject-matter and amount, and the finality and effect of their decisions, provided it does not encroach upon the proper jurisdiction of the United States, and does not abridge the privileges and immunittes of citizens of the United States, and does not deprive any person of his rights without due process of law, nor deny to any person the equal protection of the laws, including the equal right to resort to the appropriate courts for redress. The last restriction, as to the equal protection of the laws, is not violated by any diversity in the jurisdiction of the several courts as to subject-matter, amount, or finality of decision, if all persons within the territorial limits of their respective jurisdictions have an equal right, in like cases and under like circumstances, to resort to them for redress. Each State has the right to make political subdivisions of its territory for municipal purposes, and to regulate their local government. As respects the administration of justice, it may establish one system of courts for cities and another for rural districts, one system for one portion of its territory and another system for another portion. Convenience, if not necessity, often requires this to be done, and it would seriously interfere with the power of a State to regulate its internal affairs to deny to it this right. We think it is not denied or taken away by anything in the Constitution of the United States, including the amendments thereto.

We might go still further, and say with undoubted truth, that there is nothing in the Constitution to prevent any State from adopting any system of laws or judicature it sees fit for all or any part of its territory. If the State of New York, for example, should see fit to adopt the civil law and its method of procedure for New York city and the surrounding counties, and the common law and its method of procedure for the rest of the State, there is nothing in the Constitution of the United States to prevent its doing so. This would not, of itself, within the meaning of the Fourteenth Amendment, be a denial to any person of the equal protection of the laws. If every person residing or being in either portion of the State should be accorded the equal protection of the laws prevailing there, he could not justly complain of a violation of the clause referred to. For, as before said, it has respect to persons and classes of persons. It means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances,

The Fourteenth Amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two States separated only by an imaginary line. On one side of this line, there may be a right of trial by jury, and on the other side no such right. Each State prescribes its own modes of judicial proceedings. If diversities of laws and judicial proceedings may exist in the several States without violating the equality clause in the Fourteenth Amendment, there is no solid reason why there may not be such diversities in different parts of the same State. A uniformity which is not essential as regards different States, can not be essential as regards different parts of a State, provided that in each and all there is no infraction of the constitutional provision. Diversities which are allowable in different States are allowable in different parts of the same State. Where part of a State is thickly settled and another part has but few inhabitants, it may be desirable to have different systems of judicature for the two portions, trial by jury in one, for example, and not in the other. Large cities may require a multiplication of courts and a peculiar arrangement of jurisdictions. It would be an unfortunate restriction of the powers of the State government if it could not, in its discretion, provide for these various exigencies.

If a Mexican State should be acquired by treaty and added to an adjoining State, or part of a State, in the United States, and the two should be erected into a new State, it can not be doubted that such new State might allow the Mexican laws and judicature to continue unchanged in the one portion, and the common law and its corresponding judicature in the other portion. Such an arrangement would not be prohibited by any fair construction of the Fourteenth Amendment. It would not be based on any respect of persons or classes, but on municipal considerations alone, and a regard to the welfare of all classes within the particular territory or jurisdiction.

It is not impossible that a distinct territorial establishment and jurisdiction might be intended, or might have the the effect, of a discrimination against a particular race or class, where such race or class should happen to be the principal occupants of the disfavored district. Should such a case ever arise it will be time enough then to consider it. No such case is pretended to exist in the present instance.

It is apparent from the view we have taken of the import and effect of the equality clause of the Fourteenth Amendment, which has been relied upon by the plaintiff in error in this case, that it can not be invoked to invalidate that portion of the judicial system established by the Constitution and laws of Missouri, which is the subject of complaint. This follows without any special examination of the particular adjustment of jurisdictions between the courts of Missouri as affected by its Constitution and laws. Such a special examination, however, if it were our province to make it, would readily show that there is no foundation for the complaint which has been made. The plaintiff in error has had the benefit of the right of appeal to the full extent enjoyed by any member of the profession in other parts of the State. In the outside counties they have but one appeal, from the circuit court to the Supreme Court. In St. Louis, the plaintiff in error had the benefit of an appeal from the Circuit Court of St. Louis to the

St. Louis Court of Appeals. This is as much as he could ask even if his rights of appeal were to be nicely measured by the right enjoyed in the outside counties. The Constitution of the State has provided two courts of appeal for different portions of its territory—the St. Louis Court of Appeals for one portion, and the Supreme Court for another portion. It is not for us, nor for any other tribunal, to say that these courts do not afford equal security for the due administration of the laws of Missouri within their respective jurisdictions. Where the decisions of the St. Louis Court of Appeals are final they are clothed with all the majesty of the law which surrounds those of the Supreme Court. If in certain cases a still further appeal is allowed from the one court to the other, this fact does not derogate in the least from the credit and authority of those decisions of the former which by the Constitution and laws of the State are final and conclusive.

But this special consideration is an accidental phase of the particular case. The true ground on which the case rests is the undoubted power of the State to regulate the jurisdiction of its own tribunals for the different portions of its territory in such manner as it sees fit, subject only to the limitations before referred to; and our conclusion is that this power is unaffected by the constitutional provision which has been relied on to invalidate its exercise in this case.

The judgment of the Supreme Court of Missouri is affirmed.

REFORMATION OF DEED—MISTAKE—MARRIED WOMAN.

PETESCH v. HAMBACH.

Supreme Court of Wisconsin, February, 1880.

1. An action to reform a written instrument is in the nature of an action for specific performance, and relief is granted on the same principles. Therefore a mere voluntary instrument or a contract originally *nudum pactum* will not be reformed.

2. P being the owner of two lots, one occupied by him as a homestead, the other of little value, gave a mortgage in which his wife joined, intending to cover his homestead. By mistake the deed described the other lot. P having subsequently died: *Held*, that there could be no reformation of the instrument.

Appeal from Sheboygan Circuit Court.

The action is to reform a mortgage. The facts as found by the circuit court, so far as it is necessary to state them, are as follows:

In 1875 one Peter Petesch was the owner of lots "A" and "B" in a certain block in the village of Random Lake. Lot "A" was his homestead, on which he and his wife resided. Peter obtained a loan of $800 of the plaintiff, under an agreement to secure the payment of the same, and the interest, by a mortgage on lot "A." A mortgage was accordingly drawn and executed by Peter and his wife, all parties supposing it to be upon the homestead lot. It was afterwards discovered that it was upon lot "B" instead of lot "A"—so drawn by mistake. Lot "B" is of small value, is inadequate security for the mortgage debt, and the parties did not intend to include it in the mortgage. Peter died in 1876 and the homestead descended to his widow as his only heir at law, or it was devised to her. In 1877 the widow married Jacob Hambach, and soon thereafter conveyed the homestead to him through an intermediate party. The conveyance was not made upon a valuable consideration. This action was brought against Jacob Hambach and his wife (late Mrs. Petesch), to correct the mortgage and constitute it a lien upon lot "A." The circuit court denied the relief prayed and gave judgment dismissing the complaint with costs. The plaintiff appeals from the judgment.

W. H. Seaman, for appellant; *Frisby, Weil & Barney*, for respondents.

LYON, J., delivered the opinion of the court:

An essential condition upon which a court of equity will reform a written instrument is that the parties thereto have made a binding contract which they mutually agreed to incorporate in the instrument, but which, through fraud or mistake, they failed to do. The original contract must be valid, or no reformation of the instrument will be decreed, however clearly the mistake be established. It was said by Lord Harwicke, in Henkle v. Royal Ex. Assurance Company, 1 Ves. Sr. 317, that if the contract relates to an illicit subject the relief will not be granted. In Eaton v. Eaton, 15 Wis. 259, this court refused to reform a voluntary deed by compelling the grantors to affix a seal. Mr. Justice Paine, delivering the opinion of the court, said: "It is well settled that equity will not interfere to enforce a voluntary contract to convey. Smith v. Wood, 12 Wis. 382. A defective attempt to make a voluntary conveyance stands upon the same ground."

In the opinion by Dixon, C. J., in Hanson v. Michelson, 19 Wis. 498, it is said: "It is a familiar rule that a defective deed may be treated in equity as an agreement to convey and performance enforced, and where it is, we think, as was held in Eaton v. Eaton, that it stands on the same footing as an executory contract to convey, and that it will not be carried into effect by a court of equity if it appears to have been made without consideration." In the late case of Sherwood v. Sherwood, 45 Wis. 357, the power of the court to correct a mistake in a will was denied. One of the grounds of the judgment is thus stated: "The reason why courts of equity will not interfere in such cases seems to be that an action to reform a written instrument is in the nature of an action for specific performance, and the making of a will being a voluntary act there is no consideration, as in actions to reform deeds or contracts, to support the action. Hence it is said in a note by the editor of Wigram's Treatise on Extrinsic Evidence in Aid of Wills, that 'volunteers under wills have no equity whereon to found a suit for specific performance.'" In Hunt v. Rousmanierre's Adm'rs. 1 Pet. 1, it is said that "the execution of

agreements fairly and legally entered into is one of the peculiar branches of equity jurisdiction; and if the instrument which is intended to execute the agreement be from any cause insufficient for that purpose, the agreement remains as much unexecuted as if one of the parties had refused altogether to comply with his engagement; and a court of equity will, in the exercise of its acknowledged jurisdiction, afford relief in the one case as well as the other, by compelling the delinquent party to perform his agreement according to the terms of it, and to the manifest intention of the parties."

The above citations, which might be increased almost indefinitely, are sufficient to show that an action to reform a written instrument is in the nature of an action for specific performance, and relief is granted therein on the same principles. Also that an instrument not founded upon sufficient consideration—that is, a mere voluntary instrument—will not be reformed; neither will an instrument be reformed to express a contract which originally was *nudum pactum*. Indeed, the authorities on this subject, both in this country and in England, all seem to be one way.

There has been some conflict of decision in the application of the principles above stated to cases where the contract omitted from, but sought to be embodied in, the reformed instrument was, while resting in parol, void by the statute of frauds. Such a case would arise if from a conveyance executed in attempted compliance with a parol contract for the sale and purchase of land, the land intended, or some part thereof, should be omitted by mistake.

In Massachusetts and Maine, and perhaps in some other States, it has been held that the conveyance can not be reformed unless there is a valid, to-wit, a written executory contract of sale to reform by. Glass v. Hulbert, 102 Mass. 24; Elder v. Elder, 10 Me. 80. To the same effect are the cases of Osborn v. Phelps, 19 Conn. 63, and Best v. Stow, 2 Sand. Ch. 298. Some of these cases concede the right of the defendant resisting specific performance to show by parol that the instrument sought to be enforced does not correctly express the agreement of the parties, but deny the same right to a plaintiff seeking reformation of an instrument.

It is said by Professor Pomeroy, in his late treatise on the Specific Performance of Contracts, that the preponderance of judicial authority in this country supports the opposite doctrine, to-wit: that the statute of frauds is no impediment to the reformation of a conveyance; and in his notes to section 204, he cites numerous cases in support of that proposition. But the learned author states (no doubt correctly), the ground upon which these decisions rest. He says: "The statute of frauds is no real obstacle in the way of administering equitable remedies so as to promote justice and prevent wrong. Equity does not deny or overrule the statute; but it declares that fraud —and the same is true of mistake—creates obligations and confers remedial rights which are not within the statutory prohibition—in respect of them the statute is uplifted." Section 266, page 350.

This is but another mode of saying that, notwithstanding the statute of frauds, there is in such a case a valid and binding executory contract, which the parties intended and attempted to embody in the instrument sought be to reformed, but failed to do so. Hence the cases which uphold the reformation of written instruments in proper cases, without regard to the statute of frauds, are in entire harmony with the rule above stated that there must be a valid binding contract to reform by or reformation will not be decreed.

In general, by the principles of the common law a *feme covert* can do no act to bind herself; she is said to be *sub potestate viri*, and subject to his will and control. Her acts are not, like those of infants and some other disabled persons, voidable only, but are, in general, absolutely void *ab initio*. Elliott v. Perisol, 1 Pet. 338. Because of her disability to contract it has uniformly been held that if a wife join her husband in the execution of a defective conveyance, such conveyance can not be reformed as to her unless by virtue of an express statute. The cases to this effect will be found cited in the argument of counsel for the defendants.

Hamar v. Medsker, 60 Ind. 413, 7 Cent. L. J. 79, is relied upon by counsel for appellant to sustain this action. In that case a married woman owned land in her own right, sold it and received the purchase money therefor. She executed a conveyance to the purchaser, in which her husband joined, but by mistake the land actually sold was not described therein. A statute of that State is as follows: "No lands of any married woman shall be liable for the debts of her husband; but such lands and the profits therefrom shall be her separate property, as fully as if she was unmarried; provided, that such wife shall have no power to encumber or convey such lands, except by deed, in which her husband shall join." The action was to reform the deed so that it should convey the land actually sold, and it was so reformed. There was no argument by counsel against the power of the court to correct a mistake in the deed of a married woman. The opinion asserts that "the lands of a married woman can be conveyed or encumbered in no other mode than that prescribed by the statute; and her agreements in relation thereto, not executed in the manner prescribed by the statute, are void;" but says that by the correction of the deed the object and policy of the statute are not contravened or thwarted, because the husband joined in the defective deed. The decision stands alone, and the reasoning upon which it is rested is not sufficiently strong and convincing to justify us in accepting the adjudication as authority. We should be better satisfied with it had the court applied another principle of equitable jurisdiction and decreed that because the land sold was the separate estate of the wife, and because she had received the purchase money therefor, the purchaser should have a lien upon the land purchased

for the amount he paid on account of the purchase.

An article in 7 Cent. L. J. 182, reviews this Indiana case, and points out with clearness and force the fallacy of the argument upon which the decision is rested, and the unsoundness of the decision. This article also cites many cases on the general question, which it has not been thought necessary to cite in this opinion. Other articles on the subject are contained in the same periodical in vol. 7, p. 434, and vol. 8, p. 42, maintaining, with considerable ingenuity of argument, the doctrine of the Indiana case. But we think the writers have signally failed to give any sufficient reason for destroying the old and well established landmarks of the law in this behalf.

If the land, which it is claimed should be included in the mortgage sought to be reformed in this action, was the separate estate of the wife, and especially if she had received to her own use the money which it was given to secure, in view of our statute, which removes the disability of coverture and enables the wife to contract in respect to her separate estate the same as though she were sole, it may be that the mortgage might be reformed as against her. However, this is not here decided. Again, had not such land been a homestead, no doubt the mortgage should be reformed as to the interest therein of the husband, but not to affect the dower right of the wife.

But the land affected by the action being a homestead, the husband was under legal disability to mortgage it, without the signature of the wife to the mortgage. Without her signature a mortgage executed by him is invalid. Hence, a reformation of the mortgage as to him, or his heir, or the devisee of the land, without reforming it at the same time as against the wife, would be wholly inoperative for any purpose.

The homestead in controversy belonged to the husband. The wife had no estate in it by virtue of the homestead right. She had only an absolute veto upon the power of her husband to alienate it, which the statute executes for her until she sees fit to affix her signature to her husband's conveyance of it. Godfrey v. Thornton, 46 Wis. 677. Our statute only removes the disability of coverture in respect to the separate estate of the wife. This homestead not being the separate estate of the wife, it is clear that she was under the common law disabilities of coverture when she signed the defective mortgage. Being so, she could only validate her husband's mortgage of the homestead by signing it. She has signed no such mortgage, and could not make a valid executory agreement to do so. Hence, there is no ground upon which a judgment to reform the mortgage can legally be rendered.

The death of Peter Petesch and the fact that the homestead descended or was devised to his widow are not important; neither is her subsequent marriage with the defendant Jacob Hambach, or the conveyance of the homestead to him. The case stands precisely as it would have stood had the action been brought in the life-time of Peter against the mortgagors, and must be determined on the same principles.

We have studied attentively the very able argument of the learned counsel for the plaintiffs, and the authorities which he cites. We agree with him that on principles of natural equity the plaintiff ought to have relief, and should be better satisfied could we award it to him, but we are denied that satisfaction by inexorable rules of law which we may not disregard. We must affirm the judgment of the circuit court.

COLE and TAYLOR, J. J., dissent.

CRIMINAL LAW—HOMICIDE—RES GESTÆ.

STATE v. CURTIS.

Supreme Court of Missouri, February, 1880.

1. Deceased, who was in company with the prisoner C and S, was stabbed at night in the dark and after walking one hundred yards fell, and soon after became insensible and remained so until the next morning. C offered to prove that four hours after the return of consciousness, S was taken by the sheriff to the deceased, who recognized S as the man who stabbed him. *Held*, inadmissible.

2. Wilful murder with malice and premediation, in a cool state of the blood, is murder in the first degree. Murder in the second degree is a wilful killing committed with premeditation and malice, but without deliberation.

3. The words "malice aforethought" are equivalent to "malice" and "premeditation." "Deliberation" means "a cool state of the blood;" premeditation, in a cool state of the blood, is murder in the first degree. Wilful killing, without deliberation, and without malice aforethought, constitutes manslaughter.

Appeal from Livingston County.

Attorney-General *Smith*, for State; *Shanklin, Waters & Dixon*, for appellant.

HOUGH J., delivered the opinion of the court:

The defendant was indicted for murder in the first degree for the killing of one Charles Powell, and was tried and convicted of murder in the second degree. In a difficulty at a disreputable house in Chillicothe, on the night of the 27th of July, 1878, the deceased was stabbed and mortally wounded, and on the 14th of December following died of the wounds thus received. The deceased, the defendant and one Stoner and others were together in a room, the only light in which was a lamp which the deceased took in his hands to go in an adjoining room, when it either fell into the lap of the defendant, or was knocked from Powell's hand by the defendant and was extinguished, and a struggle ensued in the dark, in which the deceased was stabbed. The testimony tended to fasten the crime upon the defendant. The deceased immediately after being stabbed left the house and walked about one hundred yards, when he fell and soon after became insensible, and so remained until after six o'clock the next morning.

The defendant offered to prove by the sheriff that he arrested Stoner, and took him to Powell's

room between nine and ten o'clock on the morning of the 28th, and that Powell recognized Stoner as the man who cut him. This testimony was rejected by the court and its exclusion is assigned for error. The defendant also complains of the action of the court in giving the following instructions on the part of the State.

"4th. The jury are instructed if they believe from all the facts and circumstances beyond a reasonable doubt, that the defendant wilfully and with his malice aforethought, but without deliberation and premeditation, stabbed and killed the deceased, Charles Powell, as charged in the indictment at the county of Livingston and State of Missouri, then they will find him guilty of murder in the second degree, and assess his punishment at imprisonment in the State penitentiary for a term of not less than ten years. The jury are instructed that murder in the second degree is the wrongful killing with malice aforethought, but, as stated above, without premeditation and deliberation; it is where the intent to kill is in a heat of passion, executed the instant it is conceived and before there has been time for the passion to subside."

"8th. In considering what the defendant said after the fatal stabbing the jury must consider it altogether. The defendant is entitled to the benefit of what he said for himself if true, as the State is of anything he said against himself in any conversation proved by the State; what he said against himself the law presumes to be true because against himself; but what he said for himself the jury are not bound to believe because said in conversation proved by the State; they may believe or disbelieve it, as it is shown to be true or false by all the evidence in the case."

* * * * * * * * * *

"10th. The court instructs the jury that if the killing was committed wilfully, premeditatedly and deliberately with means and instruments likely to produce death, then the malice requisite to murder will be presumed; and if the jury are satisfied from the evidence beyond a reasonable doubt, that the defendant stabbed and killed Charles Powell wilfully, maliciously, premeditatedly and deliberately, with an instrument likely to produce death, then it devolves upon the defendant to adduce evidence to meet and repel such a presumption."

The statements of the deceased on the morning after the difficulty identifying Stoner as his assailant were properly rejected. They were not made *in extremis*, and indeed, were not offered as dying declarations and hence were not admissible on that ground—nor could they in any point of view be regarded as the declarations of a party to the record or as binding upon the State. In criminal prosecutions the State sustains no such relation to the party injured as will render his declarations admissible in evidence against the State. Com. v. Dinsmore, 12 Allen, 235; People v. McLaughlin, 44 Cal. 435; nor were the declarations of the deceased admissible as a part of the *res gestæ*. Immediately after the stabbing and before Powell left the house, he declared Curtis cut him, and while being carried to the hotel from the place where he fell he was sufficiently conscious to state where he wished to be taken. The statement sought to be introduced was not made until nearly four hours had elapsed after his return to consciousness on the morning of the 28th. So there was no such continuous unconsciousness from the time when the wound was inflicted to the time when the declaration was made as would render such declaration a part of the *res gestæ* even on the theory contended for by the defendant.

The fourth instruction given on behalf of the State is erroneous. It is contradictory and calculated to mislead. There is no murder in the second degree under our statute without premeditation. No homicide can be murder in the second degree which was not murder at common law. The statute so declares. Wagner's Statutes, p. 446, § 2. To constitute murder at common law the homicide must have been committed "wilfully and with malice aforethought," or as the statute of 23 Hen. VIII. chap. 1, § 3, expressed it, "of malice prepense." Now the words "aforethought" and "prepensed" or "prepense" each mean "premeditated" or thought of beforehand. These words thus explained do not mean that the malice should be premeditated, for, as was said in the State v. Wieners, 6 Cent. L. J. 70, that would be absurd, as malice is only a condition of the mind; but they mean that the act which the party is prompted by his malice to commit should be premeditated or thought of beforehand, and if such act so prompted be homicide, then of course it must be premeditated. Keenan v. Com., 44 Pa. St. 55. The words "with malice aforethought" are equivalent to the words "with malice and premeditation." People v. Vance, 21 Cal. 400. Now to tell the jury that if they find that the defendant wilfully and with premeditation and malice but without premeditation stabbed and killed the deceased, they will find him guilty of murder in the second degree is contradictory and absurd. Malice aforethought is usually defined by defining premeditation and malice.

In the case at bar premeditation is not defined, nor is the term "malice aforethought" defined. Simple malice is defined but there is a substantial difference between malice and malice aforethought. 1 Bishop's Crim. Law, § 429. In Regina v. Griffiths, 8 Carr. & Payne, 248, Alderson, B. said: "By the term maliciously, is not meant 'with malice aforethought,' because if it were with malice aforethought, that would constitute a still more grave offense as that would show an intent to murder." In Bradley v. Banks, Yelv. 205 *a*, it is said: * * "Although the indictment or the appeal says that the defendant *murdravit* such a man, if it does not say *malitia praecogitata*, it is but manslaughter."

That we have assigned to premeditation its proper place may be shown by examining the question from another point of view. Murder at common law was a homicide committed "wilfully and of malice aforethought." Our statute in substance declares that any wilful, deliberate and premeditated killing being also murder at com-

mon law, shall be murder in the first degree. Every other homicide, being murder at common law and not declared to be manslaughter in some of its degrees, is murder in the second degree. In State v. Wieners, *supra*, it was said, "premeditation and deliberation are not synonymous, and a homicide may be premeditated without being deliberately committed." It is further held in that case that "murder in the second degree is such a homicide as would have been murder in the first degree, if committed deliberately." If these views be correct, it must necessarily follow that all intentional homicides committed with premeditation and malice, but without deliberation, must be murder in the second degree. The word "deliberation," as used in the statute, implies a cool state of the blood and is intended to characterize what are ordinarily termed a cool-blooded murders; such as proceed from deep malignity of heart, or are prompted by motives of revenge or gain. These are classed as murders in the first degree. On the other hand, premeditation may exist in an excited state of the mind, and if the passion or excitement of the mind be not provoked by what the law accepts as an adequate cause, so as to rebut the imputation of malice, an intentional killing under the influence of such passion will be murder in the second degree. If the party act upon sudden passion, engendered by reasonable provocation, the existence of malice will be negatived, and the killing, though intentional, will be manslaughter in the fourth degree. State v. Edwards, decided at present term.

To make our meaning plain we will recapitulate our classification of intentional homicides: Where there is a wilful killing with malice aforethought and deliberation, that is, with malice and premeditation in a cool state of the blood, the offense is murder in the first degree. This definition is not intended to include cases in which specific acts are by statute made murder in the first degree. Where there is a wilful killing with malice aforethought, that is with malice and premeditation, but not with deliberation, or in a cool state of the blood, the offense is murder in the second degree; nor can any homicide be murder in the second degree, unless the act causing death was committed with malice aforethought, that is with malice and premeditation. Where there is a wilfull killing without deliberation and without malice aforethought, the offense is manslaughter; but whether manslaughter in the second or the fourth degree, will depend upon whether the facts bring the kil'ing within the 12th or the 18th section of the chapter on Homicide. State v. Edwards, *supra*.

We deem it necessary to examine the views presented in the elaborate argument of the counsel for the defendant in regard to the eighth instruction. It is almost a literal copy of an instruction which received the approval of this court in the case of State v. West, 69 Mo. 401. This instruction though in the form in which it is usually given, it must be confessed, is not happily worded, and while its phraseology might be improved without impairing its force, we do not think it calculated to mislead. Men of ordinary capacity will readily understand it, and can intelligently and properly apply it to the facts of every case in which there is any necessity for giving it.

We perceive no error in the tenth instruction. It more than complies with the requirements of the rule laid down in the case of State v. Alexander, 66 Mo. 148. After stating in the first paragraph that malice will be presumed from a wilful, premeditated and deliberate killing with a deadly weapon, the succeeding paragraph expressly requires the jury to find from the evidence beyond a reasonable doubt that the killing was maliciously as well as wilfully, premeditatedly and deliberately done with a deadly weapon. This paragraph renders all reference to legal presumption wholly superfluous.

For error committed in giving the fourth instruction, judgment will be reversed and the cause remanded. The other judges concur.

NOTE.—The instruction given in the principal case to which exception is taken is in accord with the true theory of murder in the second degree, as that offense has heretofore been understood and defined by the courts of every State in which there are two degrees of murder, and especially is it in harmony with the decisions of the Supreme Court of Missouri; but the learned judge who delivered the opinion of the court quietly ignores all the former adjudications upon the subject as unworthy of notice, and proceeds to interpret the statute as though it were one of first impression. It will be observed that the opinion in the case is mainly an attempt to define the meaning of certain words used in the description of the crime of murder, and the technical manner in which the learned judge has assigned to each word its legal etymological signification enabled him to reach a conclusion, not only at variance with the manifest intention of the law itself, but repugnant to the great current of authorities construing it.

"Malice aforethought" is first considered and disposed of as the legal equivalent of the words "with malice and premeditation," and this is the basis of the conclusion that the instruction in question is "contradictory and absurd." Keenan v. Com., 44 Pa.St. 55, is cited to support the theory that premeditation and deliberation relate to the act of killing and not to the intent, and it is true that the judge said in that case that the premeditation and deliberation is upon the killing and not upon the intent to kill; but he also says "It (murder in the first degree) requires the malice prepense or aforethought of the common law definition of murder to be, not a general malice, but a special malice that aims at the life of a person," showing that malice aforethought may mean a general malice, while premeditated malice means a specific intent to kill. And People v. Vance, 21 Cal. 400, is cited to sustain the statement that "the words with malice aforethought are equivalent to the words with malice and premeditation." But in that case the indictment omitted the words "malice aforethought," but used the words "wilfully, maliciously, feloniously and premeditatedly;" and the court said that "words equivalent in their import to malice aforethought are used." The court did not say that the words with "malice aforethought" are equivalent to the words with "malice and premeditation." In People v. Dolan, 9 Cal. 576, the word "deliberate" was absent from the indictment, which it was contended rendered it insufficient for murder in the first

degree. The court said: "The indictment charges the act to have been done with malice aforethought. 'Aforethought,' as defined by Webster, means 'premeditated;' 'premeditate' and 'deliberate' are synonymous." Thus it will be seen that the same authority which decides that aforethought is the equivalent of premeditated, also decides that premeditated and deliberate are synonymous — *i. e.*, mean the same thing. It is to be regretted that we have not words in the English language with which to express our thoughts or meaning without being required to use ambiguous words or words having two or more significations. As it is, different significations often attach to the same words, and we are left to discover their meaning from the context or the subject matter in hand, and we have many words which mean substantially the same thing, and we call them equivalent or synonymous. We are not always happy in selecting such words in describing an act, a thought, or condition or quality of the mind as will clearly impress upon the understanding of others the meaning or idea we wish to convey, and unfortunately our law makers have not always been free from the same improvident use of words; yet when particular words, though having a technical meaning, have been used in connection with a particular subject from time immemorial, and we find our legislatures and courts using the same words in relation to the same subject or matter, we are constrained to believe that they were used in the sense in which they have hitherto been regarded. This is a sound rule of construction, and the courts have no right to depart from it.

In almost every attempt made by our courts to distinguish between the two degrees of murder, they commence by saying that "to constitute murder at common law the homicide must have been committed 'wilfully and with malice aforethought.'" The word malice is a very difficult one. Many efforts have been made to define its meaning, but with unsatisfactory results, because it is is used in various and conflicting senses. In its popular sense it means animosity, hatred, ill-will and the like; and in another sense it may be taken as equal to criminal intention; but intention is said to be the essence of every crime, and this view of the word would not serve to distinguish one crime from another. In its legal sense it is understood to mean a settled intention to harm; a design formed of doing mischief to another. Kelyng 119 p. 127; Star Chamber Cases, A. D., 1630, p. 5. "It denotes a wrongful act done intentionally without just cause or excuse." 10 B. & C. 272, Littledale, J. "It means any wicked or mischievous intention of the mind." 2 B. & C. 268, Best, J. "A wrongful act done intentionally and without just cause denotes malice, *i. e.*, furnishes evidence of malice." Nichols v. Com., 11 Bush. 496. The definition given by Littledale, J., is adopted by the courts in Canada. McIntyre v. McBean, 13 U. C., Q. B. 542; 10 L. C. J. 97. And in Missouri. 66 Mo. 13; 23 Mo. 287, 325; 31 Mo. 147.

Again, malice is said to be express or implied. The definition of express malice given by Lord Hale is: "When one with a sedate and deliberate mind, and formed design, doth kill another; which formed design is evidenced by external circumstances discovering that inward intention; as lying in wait, antecedent menaces, former grudges, and concerted schemes to do him some bodily harm." 1 Hale, 451. But this definition is not broad enough to cover what is understood to be legal malice, or all cases of homicidal malice, hence the necessity of another definition called implied or constructive malice. The Code of India (Article 300) gives the following definition: "Express malice may be said to be the positive possession of an intention of causing death, or such bodily injury as the offender knows is likely to cause death. Implied malice may be said to be the possession of a general intention of such a nature, implied from the acts of the offender, or a wanton running of a risk by a person committing an act, who knows that it will probably cause death, without any excuse for incurring such risk." In general the malice required by law to constitute murder, is either an intention to kill, or an intention to commit one of the great felonies mentioned in the statutes, or an intention to do some act calculated to endanger the life of another. If malice be a condition of the mind, it is a thinking condition. The murder-malice is usually described as "malice aforethought" or "prepense," but this addition to it will not, in itself, help us to any better understanding of the state of mind required to constitute murder; for malice-aforethought is the term used to express the crime of murder at common law, and it was applied alike to all cases of murder, the wilful, deliberate and premediated killing, as well as to a killing when the offender had not the slightest wish to injure the deceased. In one case the word "aforethought" is the equivalent of the words "deliberate and premeditated;" in the other, it represents a condition of things to which the term premeditated has no application whatever. For instance, "malice aforethought" means the intention to kill. Beauchamp v. State, 6 Blkf. 299; denotes purpose and design in contradistinction to accident and mischance. Webster's Case, 5 Cush. 306. The killing is of malice aforethought whenever it is voluntary, and is not justified, excused or extenuated by circumstances. See Foster, 256; 4 Bl. Com. 198; 1 Hale, 424. "Malice aforethought" as thus defined covered all cases of murder, from the premeditated, deliberate act in cold blood, to the momentary blow given without premeditation, provocation or excuse. "There can be malice aforethought without deliberation and premeditation." Finn v. State, 5 Ind. 400. It has been well said: "The word 'aforethought' is unfortunate; 'wilful and malicious' homicide would be better. The word 'aforethought' countenances the popular error that a deliberate, premediated intent to kill is required in order to constitute the guilt of murder, whereas it is only one out of several states of mind which have that effect. It is moreover, an unmeaning word, for the thought, the state of mind, whatever it is, must precede the act; and it precedes it equally whether the interval is a second or twenty years." Fitz. St. 118; 2 Bish. Cr. Law, § 672, 675. The almost universal expression has been by all the courts throughout the country that malice is necessary to constitute murder in either degree, and the distinction consists in its being accompanied in the first degree with, and in the second degree without, deliberation and premeditation. See 64 Mo. 191, 319, 591; 61 Mo. 549; 67 Mo. 594; 66 Mo. 13.

If the killing is intentional, but not deliberate and premeditated, it is murder in the second degree. Shufflin v. People. 62 N. Y. 229; 24 Cal. 30; 35 Mich. 16; 59 Mo. 135; 53 Mo. 234; 64 Mo. 591, 191; 65 Mo. 530.

The word "premeditated," as used in the statute, is not intended to take the place or stand as the equivalent of the word "aforethought" in the description of murder. Murder is simply divided, not defined, by the statute. The word murder *ex vi termini* implies or signifies a homicide committed with malice aforethought so that every wilful, deliberate and premeditated killing with malice aforothought is murder in the first degree. The statute says nothing about "malice" or "malice aforethought," and yet no indictment would be considered sufficient unless it contained these words. This being so we

have the folly of using two words of the same signification in the indictment and can not omit either, and the statute would run thus; every wilful killing with malice aforethought, wilfully, deliberately and aforethought, etc., which would be absurd. This *expose* at once shows that aforethought and premeditated were never supposed to mean precisely the same thing, and both words have a legitimate place in the description of murder, the one intended to express a superior degree of malice, and the other to signify a positive action of the mind, as a thought or intention dwelt upon, considered and reflected upon, *i. e.*, premeditated before it is put into execution. "Thought" is not the equivalent of "meditated;" "aforethought" would be nearer its equal, and the word meditated is somewhat enlarged in its signification by the addition of the "pre." The term aforethought is satisfied if the act was thought of at all (or when it is the result of some act dangerous to life, etc.), because the thought, the conceiving of the thing must precede the act, while premeditation requires that the thought or thing must be pondered, reflected upon by the mind before it is put into execution. It seems to me that the words wilful and malicious might be regarded as equivalents, as used in the description of murder, with as much propriety as the words "aforethought," and "premeditated;" for wilful means intentional, not accidental, and malice means criminal intention, such intention as the law regards as criminal. If a wrongful act is done intentionally it is wilful, and it is, or may be, malicious, yet no one would suppose that the use of both words in describing an act would be absurd, or that to say if the act was wilful and not malicious it would be contradictory.

It is said that "premeditation and deliberation are not synonymous words, and that a homicide may be premeditated without being deliberately committed, and that murder in the second degree is such a homicide as would have been murder in the first degree if committed deliberately." The words deliberately and premeditatedly are generally coupled together to express or describe the action of the mind (because both words signify positive action) with reference to the homicidal act, for although they mean the same thing, or may under some circumstances be used as equivalents, and either would be understood to express the quality of mind, or action of the mind required to constitute murder in the first degree, yet when joined together they express a more positive, active, conscious state of mental action, or a deeper and superior degree of malice, because intensified by the deliberation and premeditation of the mind; and if either deliberation or premeditation should be absent while the other is present, if such could be the case, the offense would be murder in the second degree. But how can the mind premeditate without deliberating, or deliberate without premeditating? To premeditate is to deliberate, but in order to make a distinction it is attempted to assign a new signification to the word deliberate, viz., "a cool state of the blood." Deliberate does not mean in a cool state of the blood. It is a term generally used to describe an inexcusable or unprovoked act of violence, whether it be done in a cool state of the blood or under excited or heated blood. There is no warrant in the law for injecting into the crime of murder in the first degree a cool state of the blood as an essential ingredient thereof. This has never been attempted before. The blood may be cool, but it need not necessarily be so. If premeditation can exist in an excited state of mind, as is claimed in the principal case, by what sort of metaphysical hair-splitting differences do we exclude deliberation under the same circumstances? It is impossible to describe the speed of human thought or to conceive of the great rapidity with which the mind acts even in the midst of excitement and confusion; much will depend on the temperament of the individual. The situation, the result and the consequences may all be taken in at a glance and be disposed of in a moment, and especially may this be the case since all persons are conscious of the moral aspect of crime and aware of the consequences to themselves before engaging in it. Indeed, the great velocity of reflection of thought can not be measured by time, nor be confined to any particular state of blood or condition of excitement. If, however, the mind should be so clouded and obscured by excitement as not to be able to exercise the power of reflection, premeditation or deliberation, and these products of the mind should be absent, the act could not be murder in the first degree but would be murder in the second degree; and if the heat or excitement be caused by sufficient provocation, such as in law would exclude malice or design, the offense would be manslaughter.

To make his meaning clear, the learned judge recapitulates his classifications of intentional felonious homicides, and divides them into three classes, viz., murder in the first degree, murder in the second degree, and manslaughter in the second or fourth degree, owing to the facts, etc.

The assignment of an intentional homicide to manslaughter in the fourth degree shows that the learned court has wholly misconceived the intention of the law, but it has been forced to place it there to be consistent in its construction of the statute defining the different degrees of homicide as constituting so many distinct offenses and not degrees of which the greater includes the less. For instance, the court holds that to warrant a conviction for manslaughter in the first, second or third degree, the killing must be "without a design to effect death," because the statute uses those words in defining those degrees. In speaking of a similar provision of statutory law, the New York Court of Appeals said that "the sole purpose of the words 'without any design to effect death' was to dispense with proof of any design. It can not be supposed that the legislature meant to require proof in such a case that the killing was absolutely without any design to effect death, and in case of such proof to make it murder in the first degree; whereas in case of proof of design to affect death it meant to make it homicide in a lower degree. It would be quite absurd so to construe the statute as to enable a person charged with murder under the third subdivision of sec. five, to establish a defense by proving that he designed the murder." Dolan v. People, 64 N. Y. 485. This reasoning is clearly applicable to the Missouri statute. In defining manslaughter in the first, second and third degrees intention or design to kill is dispensed with, and need not be proven to justify a conviction; that is, the crime is made out although defendant did not intend to kill—the absence of such design or intention establishes the crime in the higher degrees, while the existence of such design or intention under precisely the same state of attending facts reduces the case to a lower degree (fourth degree). This philosophy is according to the construction given to the statute by the Supreme Court of Missouri. How unreasonable and absurd! No such thing was ever thought of or anticipated by a sensible legislature, and the statement of the fact shows conclusively that the Supreme Court of Missouri has utterly misconceived the true interpretation of the statute.

It will be noted that the first announcement that there could be no murder in the second degree without an intention to kill was made in the Gassart Case,

65 Mo. 352. But the learned judge who wrote the opinion in that case was lost or bewildered in the intricacies and mystic shadows that enveloped the subject, for he says that, "speaking for myself only, I think it extremely difficult to reconcile the doctrine (the presumption of murder in the second degree from the simple act of killing) with those cases in which it has been held by this court, that premeditation means thought of beforehand for any length of time however short: that malice is the intentional doing of a wrongful act without just cause or excuse, and that wilful means intentional; but it must now be taken as settled, notwithstanding this seeming conflict between the cases." In Wieners' Case, 66 Mo. 13, 6 Cent. L. J. 70, the same judge gives the subject more thoughtful consideration, and he extends the second degree of murder to cases of constructive malice, or as he terms it, implied intention to kill; but in the Edwards Case, the Sharp Case, the Curtis Case, and others decided at the October term, 1879, the doctrine is maintained that malice and premeditation are essential to murder in the second degree, the result of which is to ignore constructive malice or implied intention as an element in murder.

We shall continue this discussion next week in a note to the case of *State v. Sharp*.

ABSTRACTS OF RECENT DECISIONS.

UNITED STATES SUPREME COURT.

October Term, 1879.

APPEAL BONDS — WHEN LIABILITY OF SURETY BECOMES FIXED.—Plaintiff, in an action in the District Court, recovered judgment against B, and B, by a writ of error, removed the case to the Circuit Court, executing a bond with defendant as sureties, conditioned that he should prosecute his appeal to effect and to answer all damages and costs if he should fail to make his plea good. The judgment of the District Court was affirmed by the Circuit, and B by writ of error removed the case to the Supreme Court, giving a new bond with good and sufficient sureties to prosecute the appeal to effect in that court. Payment of the judgment being refused, plaintiff, without issuing execution thereon, brought action against defendants on the appeal bond. *Held*, that the action was maintainable, and that it was no defense that a new bond on appeal to the Supreme Court had been given or that plaintiff had not issued execution.—*Babbitt v. Shields*. In error to the Circuit Court of the United States for the Eastern District of Missouri. Opinion by Mr. Justice CLIFFORD. Judgment reversed. Reported in full, 21 Alb. L. J. 69.

MUNICIPAL CORPORATION—LIABILITY FOR BUILDINGS DESTROYED TO CHECK FIRE—MASSACHUSETTS STATUTE— WHEN VERDICT DIRECTED.—1. A statute of Massachusetts provides in case of a fire in a city, three designated officers may direct any house or building to be pulled down in order to prevent the spreading of the fire, and in such case if it is the means of stopping the fire, the city shall be liable for the value of the building. *Held*, that the statute gave a bounty which could not have been claimed before, and (following the Massachusetts decisions) that in order to charge the city the case must be clearly within the statute. Taylor v. Plymouth, 8 Metc. 465; Ruggles v. Nantucket, 11 Cush. 436. At the common law every one had the right to destroy real and personal property, in cases of actual necessity, to prevent the spreading of a fire, and there was no responsibility on the part of such destroyer, and no remedy for the owner. In the case of The Perogative, 12 Coke, 13, it is said: "For the Commonwealth a man shall suffer damages, as for saving a city or town a house shall be plucked down if the next one be on fire; and a thing for the Commonwealth every man may do without being liable to an action." There are many other cases besides that of fire—some of them involving the destruction of life itself—where the same rule is applied. "The rights of necessity are a part of the law." Respublica v. Sparhawk, 1 Dallas, 388. See also Mouse's Case, 12 Coke, 63; 15 Vin. tit. Necessity, § 8; 4 Term Rep. 794; 1 Zabriskie, 248; 3 Id. 591; 25 Wend. 173; 2 Denio, 461. In these cases the common law adopts the principle of the natural law and finds the right and the justification of the same imperative necessity. Burlem. 145, § 6; Id. 159; C. 5, §§ 24–29; Puffendorf, B. 2 C. 6. 2. It is a settled rule in the courts of the United States that whenever in the trial of a civil case it is clear that the state of the evidence is such as not to warrant a verdict for a party, and that if such a verdict were rendered the other party would be entitled to a new trial, it is the right and duty of the judge to direct the jury to find according to the views of the court. Such is the constant practice, and it is a convenient one. It saves time and expense. It gives scientific certainty to the law in its application to the facts and promotes the ends of justice. Merchants' Bank v. State Bank, 10 Wall. 637; Improvement Co. v. Munson, 14 Id. 448: Pleasants v. Fant, 22 Id. 120. The rule in the English courts is substantially the same. Ryder v. Wombwell, L. R. 4 Ex. 32; Giblin v. McMullin, L. R. 2 P. C. App. 335. In the latter case, it was said: "In every case before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party introducing it upon whom the *onus* of proof is imposed."—*Bowdich v. City of Boston*. In error to the Circuit Court of the United States for the District of Massachusetts. Opinion by Mr. Justice SWAYNE. Judgment affirmed.

SUPREME COURT OF MISSISSIPPI.

March-April, 1880.

PROMISSORY NOTE— CONSIDERATION ILLEGAL IN PART—RECOVERY.—Suit on a promissory note for $480.50, the consideration of which was in part family groceries, and the remainder, vinous and spirituous liquors in less quantities than a gallon, sold on credit. There is no proof as to how much of the amount was for family groceries. The question involved is whether or not a recovery can be had upon any part of the note, or whether it is void *in toto*. The statute declares that if any person licensed to retail vinous or spirituous liquors, "shall trust or give credit to any person for vinous or spirituous liquors, sold in less quantities than a gallon, he shall lose the debt and be forever disabled from recovering the same, or any part thereof; and all notes or securities given therefor, under whatever pretense, shall be void." Code of 1871, § 2464. *Held*, that to the extent that the note was given for the vinous and spirituous liquors sold on trust or credit, the statute makes it void, and being thereby rendered illegal, in part, it is void in whole, and can not be enforced. The invalidity of the note did not affect what the payee had a right to recover

without the note; but the only question now presented is the right to recover on the note, and that is answered in the negative. Reversed. Opinion by CAMPBELL, J.—*Colton v. McKenzie.*

CRIMINAL PROCEDURE—OPINION OF JUROR AS TO COLLATERAL CRIME — "HOUSEHOLDER" — CHALLENGE.—1. The appellant was convicted of perjury in testifying to a false *alibi* on the trial of one W for arson. When the jury were being impanneled one M was examined by the court as to his qualifications; he stated that he had not formed or expressed any opinion as the guilt or innocence of the prisoner, but had formed a decided and fixed opinion as to the guilt or innocence of W, on whose trial for arson the perjury was charged to have been committed. He was challenged by appellant for cause, but his challenge was overruled by the court. *Held*, error. A juror should be entirely free from prejudice or bias. This can not be if a juror has a fixed and settled opinion on the subject matter in controversy. If the testimony of the prisoner on which perjury is assigned is true, it is impossible that W could be guilty. A conclusion in the mind of the juror that W was guilty therefore necessarily involved a belief that the testimony of the prisoner on the subject of the *alibi* was false. It being false did not make appellant guilty, for he could still make the defense that it was not wilfully or corruptly false. It is impossible to lay down any precise general rule on the subject. The most we can do is to decide particular cases as they arise; and in doing this whenever we decide that a fact as to the existence of which the juror has a clear and settled conviction and opinion, is so connected with the main fact in issue, that it is difficult to disbelieve the co-existence of the main fact which is usually associated with the fact believed, we will hold the juror incompetent. 2. A merchant, unmarried, who has a rented store in which he sleeps is not a "householder," and is therefore not qualified as a juror. 3. It was insisted by the State that the prisoner could not complain of the presence of M on the jury, as he could have excluded M from the jury by a peremptory challenge, and his peremptory challenges were not exhausted before the complete impanneling of the jury. *Held*, that a prisoner on trial is not obliged in order to get rid of an incompetent juror held competent by the court, to resort to his peremptory challenges. He has the right to have the competency of a juror challenged by him rightly decided by the court and to have him set aside, if he is incompetent. Opinion by GEORGE, C. J.—*Brown v. State.*

SUPREME COURT OF ILLINOIS.

February-March, 1880.

TAXATION OF PERSONAL PROPERTY — SITUS — USE.—1. Personal property temporarily in this State, as for example passing through it, is not taxable, under sec. 1, cl. 1 of the revenue law, which provides that all real and personal property in this State shall be assessed and taxed. 2. Though as a general rule the *situs* of personal property is presumed to be that of the owner, yet where personal property is permanently located at a particular place it is liable to be taxed there. 3. A boat is subject to taxation at the place of its registration and where it lies up when not in use—in other words, at its home port, and this without regard to the place where its owners may reside. Therefore where a transfer boat is registered at Cairo in this State, and is owned one-half by a corporation in this State and the other half by a corporation in another State, is used for the transfer of the cars, etc., of both corporations, from Cairo to the Kentucky shore and back, and when not in actual use is laid up in Cairo, where the hands operating the same reside, and where the companies assessed have a business office, the interest of each of the corporations is subject to taxation in Cairo. 4. A person not the owner or lessee of property who uses it with the owner for a compensation can not be assessed for one-half the taxes on the house. Therefore where one railroad company builds a car hoist and lays a third rail upon its own ground, and at its own expense, which is attached to and becomes a part of the soil, another railroad company using the same jointly with the other, for which he pays a compensation, can not be taxed for one half its value, and if such a tax is levied against it a court of equity will enjoin its collection. Decree reversed in part. Opinion by WALKER, C. J.—*Irvin v. New Orleans, etc. R. Co.*

LIABILITY OF SCHOOL DIRECTORS FOR EXPELLING SCHOLARS — MALICE ESSENTIAL. — Action by plaintiff against a teacher and school directors to recover damages on account of his suspension for non-observance of a rule. The rule in question required that during the opening exercises, which consisted in reading the Bible, every pupil was to lay aside his books and remain quiet. No one was required to participate in these exercises unless he chose to. Plaintiff was a Catholic, and for the non-observance of the rule, which it is alleged was void as interfering with the religious convictions of the plaintiff and his father by pursuing his usual studies without noise or disturbance, he was suspended from "all the rights and privileges of said school until he should express a willingness to comply with the rule." The declaration contained no averment that the defendants acted either wantonly or maliciously. *Held*, that a demurrer thereto was properly sustained. No action can in such cases be maintained against school directors when they act without malice. A mere mistake in judgment, either as to their duties under the law or as to the facts submitted to them, ought not to subject such officers to an action. They may judge wrongly, and so may a court or other tribunal, but the party complaining can have no action where such officers act in good faith, and in the line of what they think is honestly their duty. Any other rule might work great hardship to honest men, who, with the best of motives, have faithfully endeavored to perform the duties of these inferior officers. 38 Me. 389; 11 Johns. 114; 1 Earl, 555; 88 Ill. 60. Affirmed. Opinion by SCOTT, J.—*McCormack v. Burt.*

RESULTING TRUST — WHO MAY PURCHASE AT EXECUTION SALE.—1. One of two joint defendants in execution purchased land at the execution sale, paid the amount of his bid, and received from the officer a certificate of purchase. Under a misapprehension as to his rights to become a purchaser at the sale, he surrendered his certificate of purchase to the officer and procured another to be issued to a third person, but retaining it in his own hands until the time of redemption expired. He then, under some agreement not involving the payment of the money, delivered this certificate of purchase to the person in whose name it was issued, who thereupon assigned it to his wife, and she at once took a sheriff's deed in her own name. The wife had knowledge of all the facts, and was a mere volunteer. *Held*, that a resulting trust arose in favor of the person who paid the money. 2. An execution creditor may become a purchaser at his own sale, and no reason is perceived why one of two defendants, at a sale on joint execution, may not become the purchaser of the property

of the other. In a case like the one at bar there is great propriety in it. It might be the only speedy mode of securing himself against loss on account of his suretyship. It is not against any sound public policy, when no relations of trust exist between the parties, and where such purchaser does not thereby obtain any unconscionable advantage over his co-defendant, for whom he is only surety. In Gibson v. Winslow, 38 Pa. St. 49, it was held one joint judgment debtor might become the purchaser of his co-defendant's land at a sale on an execution issued on a joint judgment. The same principle is stated in Herman on Executions, § 208, and in cases cited. Coggeshall v. Ruggles, 62 Ill. 401, distinguished. Decree affirmed. Opinion by SCOTT, J.—*Mathis v. Stufflebeam.*

SUPREME COURT OF TENNESSEE.

April Term, 1880.

BOND FOR COSTS—PEACE WARRANT.—A justice of the peace has no authority to require from the appellant for a peace warrant a bond with security for the costs. Opinion by COOPER, J.—*State v. Smith.*

PAROL ASSIGNMENT.—A parol assignment of a part of a lien debt, with the right of priority of satisfaction, is binding on the assignor. Opinion by COOPER, J.—*Hicks v. Smith.*

ASSIGNMENT FOR CREDITORS—EQUITY JURISDICTION — ASSIGNEE CHARGED WITH INTEREST.—1. Under a bill filed for the removal of the assignee named in an assignment for the benefit of creditors, and for the appointment of a receiver to execute the trust, though this relief be refused, the court acquires jurisdiction of the whole trust to an extent sufficient to authorize the assignee to give additional bonds, and his sureties on such bonds become liable for his default as assignee. 2. If such an assignee improperly retains the trust fund, claiming it as compensation when not entitled thereto, he is chargeable with interest on it. Opinion by MCFARLAND, J.—*Faust v. Levy.*

MORTGAGE — FAILURE OF CONSIDERATION — INJUNCTION—LIABILITY OF INDORSERS—DEMAND AND NOTICE.—1. B, G & B had a mortgage on land devised to W W T. He being in possession, and the time for payment being passed, sold and conveyed the land to W, with the assent of B, G & B, they releasing their mortgage and receiving the notes given by the purchaser, secured by another deed of trust, having twenty-one months to run. The land was subject to the debts of the ancestor, the devisor of W W T. It was afterwards subjected to sale for their payment. The purchaser remained in possession up to the time of appropriation of the land to the ancestor's debts, the rents amounting to as much or more than the notes given for the purchase. *Held*, on a bill to enjoin the collection of the notes in the hands of B, G & B and their assignees, that the consideration paid by them was ample, in the loss of the rent, which they might have appropriated to their debt; that there was no failure of consideration on their part; and that a recovery could be had on the notes. 2. If an indorser wishes to defend in equity against his liability for want of due notice, he must make such defense in his pleading. Where the case has been conducted to a hearing on the assumption that he recognized his liability as fixed, he can not for the first time raise the question under a reference ordering report as to the amount due on the notes. 3. Where the collection of indorsed notes has been enjoined by bill on the part of the maker and indorser before maturity, the holder is excused from demand and notice as to such indorser. It would be idle to demand what he was forbidden by such injunction to receive. Opinion by FREEMAN, J.—*Williams v. Bartlett.*

SUPREME COURT OF MISSOURI.

March, 1880.

SERVANTS — INCOMPETENCY — CARE IN SELECTION— BURDEN OF PROOF — QUESTION FOR THE JURY.—M, an engineer on defendant's railroad, was injured by a collision with a freight train of which E was conductor. The petition alleged that E was incompetent; that the injury resulted therefrom, and that defendants were guilty of negligence in employing him. The testimony was conflicting. The jury were instructed that the burden of proof was on M to establish the incompetency of E, and that the injury was occasioned thereby, but that the burden was on defendant to show that it used ordinary care in his selection. *Held*, error. The mere fact of the incompetency of a servant for the work upon which he was employed is not sufficient to warrant a jury in finding the master guilty of negligence in employing him. Shearman & Redfield on Negligence, § 91; 49 Mo. 169; 67 Mo. 272. It is true that the testimony showing the incompetency of the servant may warrant the inference that the master knew of his incompetency, or that he omitted to make such inquiries as common prudence dictated, and thus failed to exercise ordinary care in selecting him, but such inference is one of fact for the jury under proper instructions. Reversed. Opinion by HOUGH, J.—*Murphy v. I. M. R. Co.*

UNINCORPORATED ASSOCIATION—LIABILITY OF MEMBERS FOR ITS DEBTS— DOUBLE LIABILITY.—Plaintiffs and defendants attempted to incorporate "The Roanoke Central District Mechanical and Agricultural Association," but failed to file the articles of association with the Secretary of State, and acquired no corporate existence. 55 Mo. 310. To carry on the business of the supposed corporation plaintiffs selected therefor by their associates expended and in their individual capacity became liable as sureties for the corporation for about $3,600. Judgment was obtained against the company as a corporation, and its real estate was sold and purchased by the association for $2,000, which was paid by certain of the members named in the petition, there remaining a balance unpaid of $537.29, and some other outstanding debts against the association. The present action was against all the members of the company for an account and settlement of its affairs, and a decree was asked for the sale of said land for the payment of said debts, and that each member be made to pay his proportional share to make up any deficiency. *Held*, that the members of the association who had paid for the stock subscribed for by them, and some of whom under the supposition that it was a corporation, had paid double the amount of their stock, were not exempt from liability, the debts having been incurred for them by their associates appointed for the purpose, and it would be inequitable to throw the whole burden on the latter. Those who paid double the amount of their stock should be credited therewith without regard to the double liability imposed on holders of stock of corporations which has no application to unincorporated associations. Affirmed. Opinion by HENRY, J.—*Richardson v. Pitts.*

ADMINISTRATOR — JUDGMENT WITHOUT NOTICE — BOND APPROVAL OF — ACCEPTANCE AND DELIVERY—ERASURE OF NAMES. —W, as public administrator, had in charge the estate of H, and on ceasing to act as said officer failed to deliver to B his successor in office the assets of the estate. The latter issued notice to W and the sureties on his official bond that at the next term of the probate court he would move for a judgment against him, in accordance with the provisions of Wag. Stat. p. 81, § 67. Three of the sureties were served with notice of the proceedings and appeared and made defense, but W was not served with any notice, nor did he enter his appearance. The circuit court on appeal found that W had $2,040.10 in his possession belonging to the estate, and rendered judgment against him and his sureties. *Held*, error, it being among the fundamentals of the law that a personal judgment rendered without opportunity to the party sued to be heard should not be permitted to stand. 49 Mo. 526; Though no notice in terms was required by sec. 67, yet the law of itself and of necessity implies that such notice be given. 8 Mo. 370; 9 Mo. 362. *Aliter*, perhaps if under § 47, W. S. p. 77, W had made a final settlement, and the amount of assets in his hands had been ascertained, W being present, and the court having jurisdiction over him, and the sureties being liable for the ascertained default. The approval of the bond of W was not necessary to its validity. 54 Mo. 439. The evidence showed that after being signed it was placed by W in a pigeon hole of a desk in the office of the probate judge and under his control and that of his clerk. These facts in connection with the one that W after filing the bond entered on the discharge of the duties of his office sufficiently establishes the delivery and acceptance of the bond, and neither W nor any one else could subsequently release any of the bondsmen by merely erasing their names. Reversed and remanded. Opinion by SHERWOOD, C. J.—*Brown v. Weatherby*.

SUPREME COURT OF OHIO.

April, 1880.

ATTORNEY — COMPENSATION FOR SERVICES — CHARGE ON FUND.—Where the compensation of an attorney for professional services in securing a fund in the hands of a receiver for distribution is, by the rules governing courts of equity, a proper charge upon the fund, application for such compensation out of the fund should be made in the action in which the receiver was appointed. Judgment affirmed. JOHNSON, J., dissents. Opinion by BOYNTON, J.—*Olds v. Tucker*.

MECHANIC'S LIEN — "STRUCTURE" DOES NOT INCLUDE A RAILROAD.—1. Sec. 1, of the act of 1877 (74 Ohio Laws, 168), which authorizes a mechanic's lien on "any house, mill, manufactory, or other building, appurtenance, fixture, bridge or other structure," and on the interest of the owner of the same, "in the lot of land on which the same shall stand or be removed to," for labor performed or materials furnished by the contractor, "for erecting, altering, repairing or removing" the same, does not authorize such a lien upon a railroad. 2. Whether this statute provides for a lien on the bridges which form part of a railroad is not decided. Judgment reversed and cause remanded. Opinion by JOHNSON, J.—*Rutherford v. Cincinnati, etc. R. Co.*

QUERIES AND ANSWERS.

[*** *The attention of subscribers is directed to this department, as a means of mutual benefit. Answers to queries will be thankfully received, and due credit given whenever requested. The queries must be brief; long statements of facts of particular cases must, for want of space, be invariably rejected. Anonymous communications are not requested.*]

QUERIES.

29. England has adopted very short and simple forms of indictments. 1. In what work can I find these short forms? 2. What States of the Union, if any, have followed the example?

Raleigh, N. C. W. C.

30. To the head of a family our law exempts from execution or attachment two head of work horses or mules. By statute the equity of redemption may be sold under execution at law. If the purchaser of the equity under execution sale afterwards pays off the mortgage debt, can the exemptionist set up claim to his exemptions against such purchaser?

Rolla Fork, Miss. ***

31. A went into possession of a farm as a tenant from year to year, farm belonging to B. B can prove that A, without consent, pulled down at one time and reduced to lumber a house, completely severing it from the freehold. A afterwards, at another time, moved away the lumber and appropriated it to his own use. Can A be prosecuted criminally? Would he not after having severed the house from the freehold, be presumed to hold the lumber as the agent or the owner? F. H. C.

ANSWERS.

26. [10 Cent. L. J. 318.] C would take by his bid the same as any other purchaser would at such sale. See Mathis v. Stufflebeam, 10 Cent. L. J. 377. W.

Pontiac, Ill.

[Thos. D. Williams, Marlin, Tex., cites, in answer to this query, Grimes v. Hobson, 46 Tex. 420, as directly in point.—ED. CENT. L. J.]

22. [10 Cent. L. J. 298.] A deed to husband and wife vests in them a joint tenancy by entirety, and neither can dispose without consent of other, they hold *per tout, et non per my*. 2 Black. Com. 182. An act abolishing joint-tenancies does not extend to tenancies by entireties. Shaw v. Harney, 5 Mass. 521; Jackson v. Stevens, 16 Johns, 110; Den d. Hardenbergh v. Hardenbergh. 5 Halst. 42; Thornton v. Thornton, 3 Rand. 179. Survivor takes whole estate. W. S. O.

Ft. Wayne, Ind.

[C, Kansas City, Mo., in answer to this query, cites in addition to the authorities given above and heretofore, Beauchamp v. Shrader, 52 Mo. 72, and Shroyer v. Nickell, 55 Mo. 268.—ED. CENT. L. J.]

22. [10 Cent. L. J. 298.] In the case of Beach v. Hollister, 5 Thomp. & Cook, 568, the New York Supreme Court decided that where lands were conveyed to a husband and wife jointly they took title as tenants by the entirety, and that the husband had the right of possession during their joint lives, and that upon the decease of one the entire estate vested in the survivor. And that the recent statutes with reference to the estates of married women had not changed the rule. But by the Court of Appeals of the same State, in a case decided in February, 1879 (Meeker v. Wright, 7 Abb. N. C. 299) an entirely different doctrine was laid down. In the latter case it is held that a deed of lands to husband and wife which contains no statement as to the manner in which they shall be held, makes them tenants in common and not tenants of the entirety thereof; that under the statutes for married women the interests of the husband and wife are no longer identical, but separate and independent. A large number of cases are cited and commented on in the opinion of Danforth, J., and the position held by the judge seems to be well supported by the decisions referred to,

Ithaca, N. Y. MERRITT KING.

CURRENT TOPICS.

In the Court of Quarter Sessions of Lancaster County, Pennsylvania, on the third of April last, two of the editors of the Lancaster *Daily Intelligencer*, being also attorneys of the court, were sentenced to disbarment for having attacked the judge in their paper, imputing to him corruption in his office. "The charge contained in the publication," said the court (*ex parte Steinman*, 8 W. N. 298), "and of which respondents acknowledge the authorship, is undoubtedly a very grave one. In direct and express terms it impeaches the official integrity of the court. Its effect is greatly to injure if not to destroy the moral influence of the court and to impair confidence in the administration of public justice, and thereby inflict great harm on public society. And an officer of the court capable of estimating the consequences of his act—publishing to the world an article of the character admitted, and totally unwarranted, involves a degree of moral turpitude that renders him unfit to longer occupy the confidential relation which the attorney necessarily sustains to the court, and in itself constitutes a gross misbehavior in his office. By such misconduct he is self-disqualified to be longer an officer of the court, and his removal becomes a necessity. We can find no statute provision in the State, nor do we believe it was ever intended there should be, to take away or abridge the power of the court to protect itself against one of its own officers, guilty of a delinquency of that nature, and who insists on the right, as in the present instance, to repeat the grave offense. * * * * From malicious and unjust attacks by the public press, calculated to impair public confidence in its integrity and the honest administration of public justice, the court is protected, not for the sake of the judges presiding, but for the sake of the public and the suitors in the court. The misconduct in this instance is the act of these respondents, as lawyers and officers of this court, and not their act as ordinary citizens, and with them as editors and publishers we have, therefore, nothing to do in this summary proceeding. We have already shown, we think, that the dual character of lawyer and editor can not oe pleaded or admitted in justification of the transgressive act for which they are ruled to answer." The action of the court has been much discussed in the newspapers as well as in the professional journals, the former regarding it as a high-handed attempt to interfere with the liberty of the press; and some of the latter being inclined to consider that the professional oath which in the case in question was construed to include a decent respect for the court, does not require an attorney to refrain from denouncing corruption in a judge if such is his honest belief. But in *ex parte Steinman* this inquiry was not necessary, as no attempt was made by the parties when called upon to show cause, to prove the truth of the grave charge which they had published. Under these circumstances we are unable to see how the judge could have acted otherwise than he did.

In striking contrast with this example of judicial firmness is a scene which occurred in the United States Court at Chicago last week. An ex-postmaster of that city named Arthur was on trial for the embezzlement of government funds to the amount of $50,000. The case furnished the United States District Attorney, Mr. Leake, an opportunity for one of the most extraordinary scenes ever witnessed in a criminal court room. First he went on the witness stand and voluntarily testified to the good character of the swindler. Afterwards when the time came for presenting the case of the Government against the prisoner he asked the court to excuse him from this duty, on the ground that its performance would be "painful" to him. Then when Judge Blodgett had refused to allow such a course, "in the fewest words possible" as the report goes, "he asked for the conviction of his friend." It is rather surprising after this proceeding to hear that the jury returned a verdict of guilty without leaving their seats. We shall be very much surprised if we do not learn during the next few days that the Department of Justice has taken steps to inquire into the truth of this statement of the affair which is going the rounds of the newspaper and from which we take the facts as given above. If the Government shall retain in its service an officer who at a critical time has done his best to betray its interests, then we suppose Mr. Leake will not be disturbed. Of the propriety, to use a mild term, of his actions there can be but one opinion. If his friendship for the criminal was too strong to permit him to do his duty, then he should have resigned his post before the trial began. A more sickly piece of sentimentalism in an officer of justice and a more disgraceful betrayal of a case by an attorney at law we have seldom seen recorded. Pending the action of the attorney-general we would suggest that the Chicago Bar Association should investigate the matter to the bottom.

RECENT LEGAL LITERATURE.

RECENT REPORTS.

The forty-seventh volume of the Wisconsin Reports contains the cases determined at the January and August terms, 1879. The book, index and all, includes 754 pages. Most of the cases of general interest have heretofore appeared in this JOURNAL. The reporter's work is, as usual, excellent.

We have not noticed in these columns a volume of the Kansas Reports for some time. The last one (Vol. 22), which we have recently received, brings the reported cases in that State down to the July Term, 1879. There are many cases in this volume of general interest, but they have been for the most part already read in our columns. Under the Kansas law which imposes upon the judges the labor of preparing the *syllabi*, the work of the reporter is not overwhelming. What he has to do, however, is prepared with care and fidelity. The present volume contains 847 pages.

The fifth volume of Sawyer's Reports contains much that is interesting and important to the profession. In it will be found opinions by Mr. Justice Field, by Sawyer, Circuit Judge, and by District Judges Deady, Hoffman and Hillyer. Several interesting cases in

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Reports of Cases Argued and Determined in the Supreme Court of the State of Wisconsin, with Tables of the Cases and principal matters. O. M. Conover, Official Reporter. Vol. 47. Chicago: Callaghan & Co. 1880.

Reports of Cases Argued and Determined in the Supreme Court of the State of Kansas. A. M. F. Randolph, Reporter. Vol. 22. Topeka, Kas: Geo. W. Martin. 1880.

Reports of Cases Decided in the Circuit and District Courts of the United States for the Ninth Circuit. By L. S. B. Sawyer. Vol. 5. San Francisco: A. L. Bancroft & Co. 1880.

Admiralty appear, and among them that of the steamship *City of Panama*, where it is held that eight miles an hour in a dense fog is not a "moderate speed" within the meaning of sec. 4233, rule 21, of the Revised Statutes of the United States. Also the case of *The Compta*, where it is held that the ship's liability for damage to goods in transit is not affected by private contracts between the shipper and strangers for the purchase and sale of the goods. Also the case of *The Hiawatha*, in which the priority of lien of a domestic material man over a mortgagee is discussed. The Admiralty jurisdiction on the Pacific Coast is very important, as is evidenced by the fact that this volume contains no less than fourteen important Admiralty cases. The distinction between military and civil offenses is clearly drawn in *Waters v. Campbell*, where it is held that a person arrested by military force for a violation of the Indian Intercourse Act of June 30, 1854, is not a military prisoner subject to the articles of war, but a citizen charged with a non-military crime, and entitled to trial in the civil courts. In *Kow v. Nunan*, there is an elaborate opinion by Mr. Justice Field holding an ordinance of the city of San Francisco providing for shaving the heads of all prisoners, to be in violation of the Fourteenth Amendment to the Constitution, being directed against the Chinese only, and imposing on them a degrading and cruel punishment. (See 9 Cent. L. J. 142.) There are also in this volume important opinions upon the law of Attachment, Attorney and Client, Bankruptcy, Corporations, Crimes, Ejectment, Jurisdiction, Limitations, Measure of Damages, Mines and Mining, Mortgages, Naturalization, Patents and Patent Rights, Removal of Causes, Taxes and Tax Sales, as well as upon numerous other scarcely less important subjects.

BROWNE ON THE STATUTE OF FRAUDS.

No work of a legislative body has given rise to so many judicial decisions as the act which was passed by the Parliament in the twenty-ninth year of the reign of Charles the Second, which was drawn and revised by such great authorities in the law as Lords Hale and Nottingham, and which was entitled "an act for the prevention of frauds and perjuries." The title was certainly odd, suggesting a penal act rather than one whose object was simply to require men to reduce their agreements to writing instead of trusting them to the uncertainty of their memories. The number and variety of the decisions which have resulted from the passage of this statute, as well as the contradictions which some of them disclosed, induced Mr. Browne twenty three years ago to write the present treatise. Since then it has been re-issued three times, on each occasion a large additio text being necessary on account of the increase in the adjudications. Between the second and third editions over two hundred new cases were added, but in the present edition no less than 1,000 additional appear.

Mr. Browne's treatise has become so well known to the American bar that a critical examination is at this day unnecessary. A glance at the divisions into which this work is divided shows that, with a single exception, no section or phrase in the statute which has ever been a subject of dispute before the courts has been omitted. The twenty chapters of the book discuss formalities for conveying land; leases covered by the statute; leases excepted from the statute; assignment and surrender; conveyance by operation of law; trusts implied by law; express trusts; verbal contracts, how far valid; contracts in part within the statute; guarantees; agreements in consideration of marriage; contracts for land; agreements not to be peformed within a year; sale of goods, etc.; acceptance and receipt; earnest and part payment; the form, etc., of the memorandum; the contents of the memorandum; verbal contracts enforced in equity and pleading. In the appendix are set out in full all the statutes of the States which follow the provisions of the English Statute of Frauds. The exception to which we refer above is the provision of the statute in regard to wills. This topic is not discussed here for several reasons which the author states in his preface, one of which being a deserved compliment to a great work which is now being re-printed in this country from the latest English edition by rival houses —Mr. Jarman's treatise on Wills. This admirable treatise, the author admits, presents in a complete and accessible shape all that it would have been possible for him to have stated in his own.

We regard the work as one of the most valuable to the practicing lawyer which we have reviewed for some time. Every one who has had any practice in mercantile or real property law appreciates the fact that the Statute of Frauds is apt to cut a considerable figure in a majority of the cases of that character which present themselves for settlement by the courts. The increase in the size of the present edition which the thousand additional adjudications have compelled renders it a necessity to all who have previously found the former edition a help in the time of need. The book now contains 671 pages exclusive of a table of cases of eighty-four pages. Its typographical appearance leaves nothing to be desired.

A Treatise on the Construction of the Statute of Frauds as in Force in England and the United States, with an appendix. Fourth Edition. By Causten Browne, Esq. Boston: Little, Brown & Co. 1880.

NOTES.

——Thrice, within the last twelve months, says the *Law Times*, the meaning to be attributed to the expression "without having been married," or "without ever having been married," has been the subject of judicial decision. In the last case, Emmins v. Bradford, 42 L. T. N. S. 45, Sir George Jessel, disagreeing with the decisions of Mr. Justice Fry in *Re* Ball's Settlement, 11 Ch. Div. 270, and in 11 Ch. Div. 872, held that the natural meaning of the expression is without having at any time been married, and that a gift to the next of kin of a woman, as if she had never been married, excluded her children or issue from participation.

——Daniel W. Middleton, clerk of the Supreme Court of the United States, died on the 27th ult. from gout in the stomach. He had been connected with the court for over fifty years, and filled the position of clerk for nearly twenty years. Mr. Middleton was appointed clerk of the court December 7, 1863. He was on terms of personal intimacy with the judges, and was highly respected as an officer. On the 29th the court promoted James H. McKenney, the Deputy Clerk of the court, to the position of clerk. Mr. McKenney had served twenty years in the clerk's office. ——Judge Aifred Blackman, a leading practitioner of New Haven, Conn., died on the 28th ult. aged seventy-two.—Postmaster General Key has accepted a nomination to the United States District Judgship in Tennessee.